Supreme Court, U.S.
FILED
SEP 6 2000
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No. 99-1723

IN THE
Supreme Court of the United States

KLAMATH DRAINAGE DISTRICT;
KLAMATH WATER USERS PROTECTIVE ASSOCIATION;
SAM HENZEL; HENZEL PROPERTIES, LTD.

Petitioners,

v.

ROGER PATTERSON; KARL E. WIRKUS; ELUID MARTINEZ;
PATRICIA BENEKE; BRUCE BABBITT; UNITED STATES
BUREAU OF RECLAMATION; UNITED STATES OF AMERICA;
PACIFICORP; YUROK TRIBE

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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The Petition for Certiorari in this matter demonstrates that the Ninth Circuit went beyond the issues in controversy before it to expound upon the Bureau of Reclamation's authority and duties in allocating water from its water projects. In particular, the court reasoned that because the United States is in a trust relationship with the Tribes, the Bureau of Reclamation must exercise its power to allocate water from federal water projects so as to "protect [Tribal] rights" to water (Pet. App. 12a), even where those rights have never before been determined.

Based on a mistaken reading of its own prior decision in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), the court concluded that the Klamath Basin tribes, including the Yurok and Hoopa, have water rights which "take precedence over any alleged rights of the Irrigators," and thus that Reclamation "has a responsibility to divert water . . . needed to fulfill the Tribes' rights." (Pet. App. 12a-13a)

In its opposition, the United States conceded that the Ninth Circuit's decision of these issues "may not have been strictly necessary," but argues that relief is unnecessary because the discussion "was closely related" to the subject matter of the dispute (U.S. Opp. at 9-10) and is unlikely to mislead other courts. (*Id.* at 8.) Petitioners argue, to the contrary, that the Ninth Circuit's unprecedented and unqualified assertion of Reclamation's authority and obligation to allocate water based on its own assessment of unadjudicated tribal water rights is certain to sow legal confusion. (Reply at 2.)

The United States further acknowledges that the court below misunderstood its own *Adair* decision concerning Tribal water rights (U.S. Opp. at 11-12), but argues that the error is "unlikely to have meaningful, practical consequences." (*Id.* at 13.)

This supplemental brief is submitted to make the Court aware of a recent order by the United States District Court for the District of Oregon in which Section II.B.3 of the decision

below is cited as authority on precisely the issues on which it is challenged by Petitioners. In *Langell Valley Irrigation District v. Babbit,* (No. 00-6265 HO) (D. Ore. Aug. 31, 2000), irrigators in a region of the Klamath Project challenged a Bureau of Reclamation plan to release water from Clear Lake into the Lost River, thus facilitating increase in the downstream flows in the Klamath River, based in part on water rights claims of the downstream Tribes whose unadjudicated claims are addressed in Section II.B.3. (*See* Pet. App. 27a) The United States, in *Langell*, relied expressly on its trust obligations to honor these tribal water rights claims (App. 4a), and the trial court justified its decision upholding the Government's position in part on the ruling of the court below that "the government must direct operations of the Link River Dam consistent with its . . . tribal trust obligations. *Patterson*, 204 F.3d at 1213-14 [Pet. App. 11a-13a]." (App. 10a)

The *Langell* decision thus begins the process that can be expected if Section II.B.3 is allowed to stand. The gratuitous portion of the decision below is invoked to support determinations that are part of the holding of other cases, and thus gain a momentum that will likely foreclose a genuine day in court on the important and difficult questions at hand. This Court's summary reversal authority, Rule 16.1, is well-suited to addressing such fundamental abuses of judicial power.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LANGELL VALLEY IRRIGATION DISTRICT, a political subdivision of the State of Oregon, HORSEFLY IRRIGATION DISTRICT, a political subdivision of the State of Oregon, as trustees for their individual water righted patrons, and MARIO GIORDANO, an individual,	
Plaintiffs,	Case No. 00-6265-HO
v.	ORDER
BRUCE BABBITT, in his official capacity Secretary, United States Department of the Interior; LESTER SNOW, in his official capacity as Regional Director, Mid-Pacific Region, United States Bureau of Reclamation; and KARL WIRKUS, in his official capacity as Manager, Klamath Project, United States Bureau of Reclamation,	
Defendants.	

Plaintiffs Langell Valley Irrigation District (LVID), Horsefly Irrigation District (HID), and Mario Giordano, bring this action seeking to enjoin defendants, the Department of the Interior, the Bureau of Reclamation, and the manager of the Klamath Project, from continuing to implement a plan at Clear Lake and

Gerber reservoirs involving the release of volumes of water at increased rates to the Lost River. The government is attempting to release stored water to the Lost River and its tributaries for use on lands in the Tule Lake area in order to compensate for reduced irrigation deliveries from Upper Klamath Lake.

Magistrate Judge Coffin heard argument regarding the TRO application on Friday, August 25, 2000, and granted the TRO in part. Judge Coffin specifically allowed the government to commence its scheduled release of water from Clear Lake up to the level of 100 cubic feet per second (c.f.s.), but enjoined the government from increasing the flow of the release until the motion for a preliminary injunction could be heard. The government is scheduled to increase the flow to 200 c.f.s. beginning Tuesday. The government has responded to the motion in writing, so the motion can be heard as one for a preliminary injunction. As discussed below, the motion for a preliminary injunction is denied, and the government may implement its plan to increase the release of water.

FACTUAL BACKGROUND

The dispute in this lawsuit concerns the Lost River within the Klamath Project. Although Upper Klamath Lake is the principal source of water for the Project, lands in the Project have also received water deliveries from the Lost River, including water stored in Clear Lake and Gerber Reservoirs. The Lost River lies within a closed basin. The Klamath River flows out of Upper Klamath Lake at the Link River Dam and eventually empties into the Pacific. Project diversion works connect the Lost River to the Klamath River.

The Bureau of Reclamation must deliver water to Project irrigators in accordance with the rights held by the United States in the Project and the irrigators' individual repayment contracts, subject to the availability of water. Plaintiffs are two irrigation districts located on the Project's east side in the Lost

River basin. The Plaintiffs have rights pursuant to their contracts with the Bureau to receive water appropriated by the Bureau.

Inflow into Upper Klamath Lake is currently only approximately 50% of the long-term average for this time of year. The government estimates that the irrigation districts and national wildlife refuges on the western side of the Project, which generally receive water deliveries from Upper Klamath Lake, are facing a shortage of 40,000 acre feet of water from that source during the remainder of the season. Between March and April of this year, the forecast for April to September inflow into Upper Klamath Lake dropped from 512,000 acre feet to 397,000 acre feet. The forecast continues to deteriorate.

Clear Lake Reservoir, on the other hand, retains ample water from recent wet winters. The elevation of Clear Lake on August 15, 2000, was 4533.25 feet or four feet higher than average. According to the government, with normal irrigation releases for the remainder of the season, the elevation of Clear Lake would drop to about 4532.0 feet.

Upper Klamath Lake and Clear Lake Reservoir are occupied by two species of sucker fish—the Lost River and shortnose suckers. The sucker fish were listed an endangered in 1988. Based upon 1992 and 1994 biological opinions, the U.S. Fish and Wildlife Service currently considers 4139.0 feet of elevation as the minimum level to meet the need of the sucker species in Upper Klamath Lake. The low-range elevation for Upper Klamath Lake for September 30 each year is 4139.0 feet.

Downstream and west of the Project area, the Klamath River in California provides habitat for the Southern Oregon/Northern California coast coho salmon evolutionary significant unit which was listed as a threatened species in 1997. The Service believes that proper instream flows in the

river form an important component of the species' habitat needs. The Government asserts that it must manage the Project in accordance with the RSA mandate to protect the sucker and coho.

The government asserts that the Project must also address the Secretary of the Interior's trust obligations to protect tribal rights and resources which include both species of suckers for the Klamath Tribes and the coho for the tribes in the Klamath basin.

On April 18, 2000, the Bureau convened a meeting of district managers in the Project to address the management of limited water supplies during this irrigation season. The use of Clear Lake and Gerber Reservoirs was discussed to alleviate the shortfalls in water supplies from Upper Klamath Lake for irrigation purposes. On April 26, 2000, a plan was issued. The plan specifies minimum target instream flows to be maintained in the Klamath River and certain target elevations for the Upper Klamath Lake to protect threatened coho and endangered sucker fish. Water that is available and not needed to maintain stream flows or lake elevations may then be diverted to the Project for delivery to water users. The plan advised users that this would be a drier than average water year. The plan states that stored water from Clear Lake and Gerber Reservoirs is available for use in other project areas in the event a shortage occurs. The plan also states that potential effects of using additional waters from the reservoirs would be considered prior to taking action.

The Bureau estimates that the elevation of Upper Klamath Lake by the end of September will be below the levels established by the 2000 plan if current water user demands and instream flow remain unchanged. On August 15, 2000, the elevation of the Upper Klamath Lake was 4140.06 feet and forecast to drop to between 4138.40 and 4138.67 feet at present irrigation demand and instream flows at the end of

September. The net effect is a forecast shortfall of up to 40,000 acre feet of water by the end of September.

On August 16, 2000, the Bureau drafted a paper discussing the shortfall. The Bureau considered a few options and determined that release of water from Clear Lake was the best way to make up for the shortfall. The Bureau prepared an environmental assessment (EA) to consider potential impacts of three viable alternatives (curtailment of water deliveries, continuation of current deliveries from Upper Klamath Lake, and releases from Clear Lake). The Bureau determined that releases from Clear Lake would not jeopardize the continued existence of the suckers or the threatened bald eagle because the Service believes that even with the releases, elevations in Clear Lake would still be approximately 10 feet above the minimum levels previously determined to be necessary to project the lake's sucker population. Thus, the Bureau determined that the proposed action would not result in significant environmental impacts and determined in a finding of no significant impact (FONSI) that no environmental impact (EIS) statement was required.

On August 21, 2000, water users were informed that implementation of the decision would begin that week. Plaintiffs were informed that they would continue to receive their full supply of water for the remainder of the irrigation season.

On Friday, August 25, 2000, the Bureau commenced limited releases of Project water (based on Judge Coffin's ruling) from Clear Lake Reservoir in the Lost River basin in the eastern side of the Project. The Bureau plans to continue those releases through the end of September to the Tule Lake and Klamath Irrigation districts to meet projected demands through the end of the current water year. The government will monitor the releases and plans to potentially increase the releases to 600 c.f.s.

STANDARDS

In seeking a preliminary injunction, plaintiffs must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in their favor. The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly. Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991). For purposes of injunctive relief, serious questions refers to questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo. Id. Serious questions are substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation. Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits. Id.

Even if the balance of hardships tips sharply in plaintiffs' favor, however, it must be shown as an irreducible minimum that there is a fair chance of success on the merits. Stanley v. University of Southern California, 13 F.3d at 1313, 1319 (1994). Moreover, the public interest must be considered where the relief sought by the applicant might affect the public. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (where an injunction is requested which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff).

DISCUSSION

Although plaintiffs attempt to characterize the challenged action as a new operational regime for Clear Lake and Gerber Reservoir, the government has only proposed a limited action to release additional water from Clear Lake Reservoir for a little over one month.[1] Defendants assert that the Bureau is developing a long-term plan for future Project operations pending completion of the Oregon Klamath adjudication and is preparing an EIS on that plan.

It should also be noted that the Klamath Project is a single integrated reclamation project consisting of several facilities and two river basins. Accordingly, the Bureau appropriated water in both river basins for the Project as a whole.

Plaintiffs assert that: (1) Defendants' operational plan for Clear Lake and Gerber Reservoirs violates the water supply contracts of both LVID and HID; (2) the plan is incompatible with Oregon water law and violates the Reclamation Act; (3) the proposed releases are contrary to the authorizing legislation for the Klamath project; (4) the Bureau's decision is arbitrary and capricious and contrary to law; and (5) the plan constitutes a public and private nuisance.

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[1] The Bureau is preparing a long term plan for Project operations pending completion of the Oregon Klamath adjudication. The government will prepare an EIS and a record of decision will be issued when appropriate. The significance of an agency action cannot be avoided by terming an action temporary or by breaking it down into small component parts. See Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985). The court is satisfied that the current limited release is separate from the long term plan and does not constitute an impermissible piecemeal decision. The Bureau currently has no plans with regard to Clear Lake Reservoir releases beyond September 30, 2000.

1. Defendants' Operational Plan for Clear Lake and Gerber Reservoirs and the Water Supply Contracts of LVID and HID

LVID and the government entered into their most recent water supply contract in 1965. Plaintiffs claim that farmers rely on irrigation under the contract for over 16,000 acres. Article 2 of the contract provides

> The United States will impound, store, or otherwise provide water from Clear Lake Reservoir and Gerber Reservoir for the irrigation of lands in the District, and, to the extent such water can be made available, deliver water to the District at Miller Creek Diversion Dam on Miller Creek and Malone Diversion Dam on Lost River.

Contract attached to McCarley Declaration (#8) at Exhibit 1, Art. 2. Plaintiffs argue that the contract does not provide for storage in any other reservoir, including Upper Klamath Lake.

The contract provides that in the event of a shortage in the quantity of water available to the district, no liability accrues against the United States arising from such shortage nor shall any payment be reduced. Id. at Art 8(a). During periods of water shortage, the government reserved the right to apportion the available water supply among the District and others entitled under the then existing contracts to receive water from the same water supply. Id. at Art 8(b).

Plaintiffs state that there currently is no water shortage in the Reservoirs, the only sources of water available for delivery to the district under the contract. Plaintiffs contend that the water elevation in Clear Lake is relatively high, but it is low in the Upper Klamath Lake where the Bureau has released water to protect downstream coho. Thus, plaintiffs argue, there is no shortage sufficient to authorize defendants to apportion water from Clear Lake Reservoir. Therefore, the government's attempt to divide water in Clear Lake between LVID and

others in the vicinity is a breach of the contract according to plaintiffs.

Reclamation contracts are not immune from subsequent congressional legislation. Klamath Water User' Association v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 2000). Thus, statutes such as the ESA may alter how the government proceeds under existing reclamation contracts.

The LVID contract in this case does not provide that LVID is the exclusive beneficiary of water from Clear Lake and Gerber Reservoirs. The contract provides that the United States agrees to provide LVID with water from Clear lake limited to a quantity of water needed for beneficial use on a fixed number of acres. There appears to be no provision in the contract that gives LVID a right to carryover storage. Furthermore, the contract provides at Article 8(b) that in times of water shortage the government reserves the right to apportion the water supply among the district and others entitled under then existing contracts. The contract does not specify that the shortage must be only in Clear Lake or Gerber Reservoirs. It appears that construing the contract in this manner would render the phrase "among the district and others" meaningless. The Tule Lake Irrigation District and the Klamath Irrigation District are entitled to water from the Lost River and thus it would appear that the contract authorizes apportion to these districts in the event of a shortage. A shortage has occurred at Upper Klamath Lake and therefore, the government does not appear to have violated the contract provisions with LVID and HID in this respect.

HID and the government entered into their most recent contract in 1957. The contract serves more than 10,000 acres of farmland. The District is entitled to 4,200 acre-feet of storage in Clear Lake, 3,685 acre-feet of water diverted from Lost River, and a continuous flow of .59 c.f.s from the Lost River within the boundary. ¶¶ 3-5, HID Contract (attached to McCoy's Declaration (#10) as Exhibit 3. The HID contract

also prevents liability from accruing upon the United States in the event of shortage, but requires the United States to use all reasonable efforts to guard against such shortage. Id. at ¶ 14.

Plaintiffs contend that the government is violating the contract by "importing" a shortage at Upper Klamath Lake to Clear Lake Reservoir.

Plaintiffs also argue that the government's proposed actions to release water from Clear Lake and its lack of effort to prevent a shortage is also a breach of the implied covenant of good faith and fair dealing. See Orange Grove Irrigation District v. United States, 28 Fed. Cl. 790, 797 (1993) (interpret reclamation contracts in a way that will effectuate the spirit and purpose of the contract.

However, the contract specifically refers to shortages in Project reservoirs, not simply Clear Lake and Gerber Reservoirs. A limited release from Clear Lake, to mitigate the effects of a shortage in Upper Klamath lake, beyond the irrigation needs of plaintiffs (in the current water year) does not violate this provision. Indeed, the government must direct operations of the Link River Dam consistent with its ESA and tribal trust obligations. Patterson, 204 F.3d at 1213-14. The limited action does not violate the spirit and purpose of the HID contract and appears to result in no injury to plaintiffs.

At this time, plaintiffs cannot demonstrate a likelihood of success on the merits of the breach of contract claim.

2. Defendants' Plan's compatibility with Oregon Water Law

Plaintiffs claim that the stored water in Clear Lake and Gerber Reservoirs have only been put to the beneficial use of the LVID and HID and therefore the Tule Lake and Upper Klamath Lake irrigators have no right under Oregon law to the water stored there because the Tule and Upper Klamath irrigators have not perfected the "inchoate" right to use Lost River water.

Under federal reclamation law, the terms upon which project water can be put to use and the manner in which rights to continued use can be acquired is fixed by the United States. In Section 8 of the Reclamation Act, the Secretary is required to proceed in conformity with state laws with respect to the control, appropriation, use, or distribution of water used in irrigation so long as such laws are consistent with directives of Congress. See California v. United States, 438 U.S. 645 (1978).

In 1904 and 1905, the United States posted notices of its intention to appropriate all waters of the Klamath and Lost River basins in California and Oregon pursuant to the Reclamation Act and to develop the Congressionally authorized Klamath Project. The United States' water rights in the Lost River remain unadjudicated under state law. See 1918 Lost River Decree (Klamath County Circuit Court), at Section V. The decree at that time recognized that the United States' water rights would be perfected in the future. A determination of the extent to which the federal rights have been perfected under state law will have to be determined when a proper proceeding is initiated under the McCarran Amendment, 43 U.S.C. § 666. Plaintiffs do not point to any authority suggesting that the United States has now lost its ability to continue to perfects its water rights for the project.[2] Furthermore, although westside lands do not normally receive

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[2] The plaintiffs' chief concern with the government's action is that it will create a right for west side irrigators equal to their storage rights in Clear Lake Reservoir. The court expresses no opinion as to the effect of this action under state law beneficial use doctrine. However, to the extent that the plaintiffs are correct that the Government has lost its ability to perfect the water rights, then the government's present action does not result in the perceived threat to plaintiffs. At this time, the government's water rights in the Project remain unadjudicated under state law.

water from direct releases from Clear Lake and Gerber Reservoirs, they do receive water from the Lost River on an annual basis and have since the inception of the Project. Therefore, there appears to be no valid basis for the argument that the United States has lost its inchoate right to use Clear Lake storage water to irrigate the Tule Lake area.

Plaintiffs next contend that even if the inchoate rights are not lost, the government may not "enlarge" its right beyond those uses specifically provided for under the 1918 Lost River Decree. The Bureau is not bound by the Decree. The Klamath County court lacked jurisdiction over the Unite States.[3] In addition, the federal water rights recognized in the Lost River Decree were based upon plans at the inception of the Project which were acknowledged to be subject to change as the Project developed and water rights were perfected. Prior to the 1952 McCarran Amendment, the United States had not waived its immunity in regard to state general adjudications of water rights and therefore was not bound by decrees issued pursuant to such adjudications. See Mannatt v. United States, 951 F.Supp. 172 (E.D. Cal 1996).

Plaintiffs next argue that the Oregon water code prohibits the releases contemplated by the Bureau at, least before obtaining approval. However, the United States' water rights for the Klamath Project predate the Oregon Water Rights Act of 1909. Thus, the code does not control. See ORS 539.010(3) and (4).

The Bureau is free under Oregon law as it existed prior to 1909 to use its water rights in any manner it determines necessary so long as such use does not result in injury to other

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[3] Indeed, the Circuit Court of Oregon for Klamath County recently granted the United States motion to dismiss a petition to reopen the Lost River Decree brought by these same plaintiffs. See Case No. 1918 001 WR (Klamath County Circuit Court, May 12, 2000).

water right holders. See Russell-Smith v. Water Resources Department, 152 Or. App. 88, 96 (1998). A change in point of diversion or place of use could be made when it does not prejudice the rights of others. Id.

Plaintiff does contend that the releases of up to 600 c.f.s. from Clear Lake Reservoir pose a risk to public health and safety. However, the government notes that summer flows of 600 c.f.s. have been exceeded in the past because of Clear Lake operations or summer precipitation without adverse consequences to water quality. Moreover, the FONSI has mitigation measures to protect groundwater quality.

At this time, plaintiffs have not shown a likelihood of success on the merits of their claim that the Bureau's action violates state law.

3. The Proposed Release and the Authorizing Legislation for the Klamath Project

Plaintiffs argue that the purpose of the Klamath Project, pursuant to the Reclamation Act, is irrigation and reclamation. Plaintiffs contend that the purpose of the Bureau's releases of water from Clear Lake into the Tule Lake is primarily to benefit fish and wildlife and is thus not permitted under the Project's authorizing legislation. However, the Ninth Circuit has already held that the ESA applies to agency action pursuant to the Reclamation Act. See, e.g., Peterson [sic], 204 F.3d at 1213 (Because Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators.)

Therefore, plaintiffs have not shown a likelihood of success on the merits of their claim that the Bureau is violating Project purposes.

4. The Bureau's Decision and NEPA and ESA

Plaintiffs challenge the adequacy of the government's August decision to release water from Clear Lake. Plaintiffs contend that the decision to release water from Clear Lake was arbitrary and capricious under the APA, failed to provide adequate notice, and failed to follow the procedures outlined by NEPA and the ESA.

Plaintiffs argue that defendants failed to provide adequate notice for the proposed action. Plaintiffs first assert that defendant was required to publish notice in the federal register, 40 C.F.R. § 1506.6(b)(2) requires notice for actions with effects of national concern. Plaintiffs contend that the government's own EA notes that the incidental take of sucker fish from Clear Lake as a result of the action is 1000 fish and that therefore this is an action of national concern. However, this is merely an operation to release water in a local reclamation project. The Bureau is nonetheless required to provide public notice to procure local involvement of those who may be interested in the action. 40 C.F.R. § 1506.6

Plaintiffs assert that they did not get notice until a few days before the action was to commence. However, the Bureau sent its 2000 plan out on April 26, 2000, which stated that potential effects of using additional water from the reservoirs would be considered prior to taking such action. The draft discussion paper released to the public, including plaintiffs, on August 16, stated that use of Lost River supply will require analysis of environmental impacts. Plaintiff should have been aware that the Bureau intended to prepare an EA prior to issuing a decision.

There does not appear to be any regulations that prohibit the preparation of an EA over the course of a few days. Although, this may help to demonstrate that the agency made the decision in an arbitrary and capricious manner, plaintiffs do not

demonstrate at this time that the decision was arbitrary and capricious.

Plaintiffs claim that the Bureau was required to issue the FONSI thirty days prior to taking action. However, this regulation only applies in certain limited circumstances such as when the proposed action is without precedent or is closely similar to an action that would normally require an EIS. See 40 C.F.R; § 1501.4(e)(2). Releasing water from a reservoir is not unprecedented. The action is limited in duration and will not lower Clear Lake to a level determined to be harmful to the sucker population.

Plaintiffs contend that it is fundamentally irrational to "kill 1000 endangered fish" in one lake to raise the water level of another Lake. Thus, plaintiffs argue the action is arbitrary and capricious in violation of the APA.[4] The Bureau did not "decide to kill 1000 endangered fish" This is incidental to the agency's decision and the incidental take findings were necessary to determine if an EIS was necessary.

Plaintiffs argue that neither the biological opinions nor the EA offer any evidence that missing the Upper Klamath Lake elevation targets by a few inches will have any adverse impact on the sucker population. This court did previously invalidate RPA's with respect to Clear Lake and Gerber reservoirs with respect to minimum elevation levels. See Bennet v. Badgley, Case No. 93-6076-HO, at p.6. (April 13, 1999). However, the Court did not address minimum lake levels for the Upper Klamath and the impact on the sucker fish there. At this point

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[4] This claim appears better suited to the ESA. The ESA requires 60 days written notice of the alleged violation before suit may be brought. 16 U.S.C. § 1540(g)(1)(A). Plaintiffs have not provided such notice. At this point in the proceedings, the court will review the claim as properly raised under the APA.

in the proceedings and in light of the lack of present harm to plaintiffs, plaintiffs' assertions do not support an injunction.

Plaintiffs next argue that the Bureau has failed to take a "hard look" at the environmental consequences of the water release. Plaintiffs mostly rely on the 1994 biological opinion finding that minimum lake elevations are necessary to protect sucker populations in Clear Lake. However, the proposed action will maintain Clear Lake well above the minimum levels considered necessary by the 1994 biological opinion.

Plaintiffs then speculate about a parade of horribles that may befall various species and people as a result of the increased flow in the river and lowered lake levels. The decision wasn't simply based on a weekend look into the decision but also drew upon the 1992 and 1994 biological opinions and experience with river flow in the Project.

Plaintiffs next contend that the analysis of the Bureau was arbitrary and capricious because it only considered a one-time release. However, the agency is only taking action with respect to this one release of water form Clear Lake. The Bureau is attempting to prepare an EIS with respect to future management of the Project.

Plaintiffs next contend that the Bureau arbitrarily and capriciously rejected alternatives to the proposed action. However, plaintiffs do not show any alternative that would maintain the level of Upper Klamath in such a short period of time. The Bureau has determined that this is the best way to proceed at this time and it appears to be rationally related to the evidence before it.

In sum, it appears that plaintiffs are not likely to succeed on their claim that the Bureau's reliance on the expertise of the Wildlife Service was arbitrary and capricious. The Bureau through consultation with the Service appears to have adequately considered potential impacts and determined that release of the water from Clear Lake Reservoir will have no

significant impact. This is especially true given the limited duration of the project and the fact that Clear Lake elevations will remain above minimum levels necessary to prevent jeopardy to endangered fish. See Wirkus Declaration (#19) at Exhibit B (Biological assessment and Biological opinion considered effects on water supply, threatened and endangered species, wildlife refuges, water quality, Lost River flood plain, tribal resources, water rights, and cultural resources).

5. Public and Private Nuisance

Plaintiffs argue that the Bureau's action creates a public and private nuisance pursuant to state law. However, plaintiffs have failed to exhaust administrative remedies for this tort claim. The claims must be dismissed for lack of jurisdiction. See McNeill v. United States, 508 U.S. 106, 112-13 (1993). Furthermore, the action will only reduce Clear Lake reservoir by 1.8 feet more than otherwise would occur on account of irrigation releases. Thus, plaintiffs' water rights will not be affected because plaintiffs will still be able to receive all of their irrigation needs for the water year.

6. The Balance of Hardships

If the proposed action is enjoined it is likely that farmers on the west side of the Project will suffer harm in that water deliveries may be curtailed by as much as 50%. Wildlife in the Tule River area could suffer as well. If the injunction is denied on the other hand, plaintiffs' irrigation activities will continue undisturbed for the remainder of the season and plaintiffs have not demonstrated any adverse impacts for future water seasons. Furthermore, while the incidental take provision indicates that up to 1000 endangered fish may be effected, this does not tip the scales in plaintiffs' favor.

7. The Public Interest

In the Bureau's determination, it concluded that the proposed action will support the continued well being of

endangered and threatened species, support the irrigation activities of farmers on the west side of the Project, and support wildlife. Denial of the injunction would likely have a detrimental impact, especially with regard to farming activities.

Accordingly, even if plaintiffs could demonstrate a likelihood of success on the merits of one or more of their claims, they do not demonstrate that the balance of harms and public interest favors an injunction.

CONCLUSION

For the reasons stated above, plaintiffs' motion for a preliminary injunction (#6) is denied.

DATED this 31st day of August, 2000.

/s/ Michael R. Hogan
United States District Judge